UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 38

Docket No. DA-0752-08-0230-I-1

Sean D. Henson,

Appellant,

v.

United States Postal Service,

Agency.

March 13, 2009

Sean D. Henson, Broken Arrow, Oklahoma, pro se.

Chizoma O. Ihekere, Esquire, Dallas, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has asked the Board to review the administrative judge's (AJ's) initial decision (ID) affirming his removal on a charge of "Failure to Maintain Regular Attendance/Absence Without Permission (AWOL)." We GRANT the petition for review (PFR), AFFIRM the ID in part, and REMAND the appeal to the Dallas Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a Mail Handler, PS-4, with the agency's Tulsa, Oklahoma Processing and Distribution Center. Initial Appeal File (IAF), Tab 5,

Subtabs 4n, 4t. He was removed effective February 3, 2008. *Id.*, Subtabs 4a, 4c. The appellant filed a timely appeal and contended that, because he was hired as a disabled veteran and his medical problems resulted from his military service, the agency discriminated against him on the basis of his service-connected disability. IAF, Tab 1 at 7-9. He also explained that he was unable to see his physician at the Department of Veterans Affairs (DVA), who would have documented his health problems, because the agency requested the documentation during the holidays. *Id.* at 7. By the time he obtained the proper documents from the DVA, he explained, he had already been removed. *Id.*

¶3 After a hearing, the AJ found that the agency had proved its charge by preponderant evidence. ID at 2-7. The AJ further found that the appellant did not establish that the agency had discriminated against him on the basis of disability. *Id.* at 7-8. The AJ found that the penalty was reasonable and promoted the efficiency of the service, and thus she affirmed the agency's action. *Id.* at 9-10. The appellant filed a timely PFR, PFR File (PFRF), Tab 1, to which the agency filed a timely response, PFRF, Tabs 2-3.

ANALYSIS

¶4 On PFR, it appears that the appellant is seeking to assert a Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim. He argues that had he shown all of his medical records to the AJ, the AJ would have found that he suffers from service-connected medical problems and was therefore discriminated against based on his military service. PFRF, Tab 1 at 3-4. Additionally, on PFR, he asserts that the AJ erred when she found that his absences were not covered under the Family and Medical Leave Act of 1993 (FMLA). *Id.* at 4.

¶5 To the extent that the appellant is appealing an adverse action pursuant to his Chapter 75 appeal rights, we AFFIRM the AJ's findings regarding the agency's compliance with the FMLA. See ID at 5-7. The agency properly denied

the appellant's request for FMLA leave. Because of absences during the previous year, the appellant had worked an insufficient number of hours during the 26 pay periods preceding his request to meet the statutory requirement of having worked 1,250 or more hours during that time. See IAF, Tab 15 at 3, 5; *see also* 29 U.S.C. § 2611(2)(A).

¶6 We likewise AFFIRM the AJ's findings on disability discrimination. The AJ treated the appellant's allegations of discrimination due to his service-connected disability as an affirmative defense of disability discrimination based upon the agency's failure to accommodate his condition. *See* IAF, Tabs 1 at 7-9, 9 at 2. In a disability discrimination case based on a failure to accommodate, the appellant's *prima facie* case consists of a showing that he is a disabled person, and that the action appealed was based on his disability, and, to the extent possible, he must articulate a reasonable accommodation under which he believes he could perform the essential duties of his position or of a vacant funded position to which he could be reassigned. *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 53 (1998) (citing *Sheehan v. Department of the Navy*, 66 M.S.P.R. 490, 493 (1995); *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988)). In disability discrimination cases, as in other Title VII cases, once the agency submits evidence to rebut the appellant's *prima facie* showing of discrimination, the *prima facie* case drops from the case, and the appellant bears the ultimate burden of proving that he was the victim of prohibited discrimination. *Id.*

¶7 In addressing the ultimate question, the appellant must show that he is a "qualified individual with a disability" before the Board can find that an agency has discriminated against him on the basis of disability. *See* 29 C.F.R. § 1630.4. A qualified individual with a disability is an individual with a disability "who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential

functions of such position." 29 C.F.R. § 1630.2(m). In this case, reasonable accommodation means

> Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.

29 C.F.R. § 1630.2(o)(1)(ii). The AJ found, based on the appellant's testimony, that he meets the definition of an individual with a disability[1] pursuant to 29 C.F.R. § 1630.2(g), because his medical conditions (chondromalacia,[2] depression and headaches) limit his major life activities,[3] but that he does not meet the definition of a qualified individual with a disability.[4] ID at 8. The AJ found that the appellant never identified or requested any accommodation that would have allowed him to meet the requirements of his position and maintain regular attendance. *Id.*; *see Bohannon v. Department of Homeland Security*, 99 M.S.P.R. 307, ¶ 7 (2005) ("The agency's obligation to provide reasonable accommodation to the employee only arises when the employee has established his status as a qualified disabled employee. An employee must first show that a reasonable accommodation is possible before the agency may be required to engage in the interactive process to determine a reasonable accommodation.") (citations omitted). Our examination of the record likewise does not show that

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[1] "Disability means, with respect to an individual – (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such an impairment; or (3) Being regarded as having such an impairment." 29 C.F.R. § 1630.2(g).

[2] Chondromalacia is the softening of the body's cartilage. Stedman's Medical Dictionary 369 (28th ed. 2006).

[3] "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

[4] The AJ set forth the appellant's burden of proof and the applicable law in an order issued prior to the hearing. IAF, Tab 9 at 2-3.

the appellant ever articulated any accommodation. Accordingly, he failed to meet his burden of proof on the affirmative defense of disability discrimination.

¶8 Turning to the appellant's apparent attempt to raise a USERRA claim on PFR by arguing that, because the "medical problems" that were the subject of his disability discrimination claim arose during his military service, the agency's discrimination against him based on those problems was also discrimination based on his military service, we find that the appellant has failed to raise a cognizable USERRA claim on PFR. The Board has held that where an appellant raises a claim of disability discrimination based on an injury incurred during military service, the fact that the appellant incurred the injury during military service is incidental to the appellant's claim of disability discrimination and does not make the appellant's claim a USERRA claim. *See McBride v. U.S. Postal Servic*e, 78 M.S.P.R. 411, 415 (1998). Thus, contrary to the appellant's argument on PFR, the fact that his disability is service-connected does not make the appellant's claim a USERRA claim.

¶9 To the extent that the appellant is raising a USERRA claim, he did not explicitly do so during the proceeding before the AJ. While he stated that he is a disabled veteran, and that his medical condition was service-connected, his argument appeared to focus on, and the AJ addressed, discrimination based upon the disability itself, and not the way in which the disability was incurred. *See* IAF, Tab 1 at 7-9; ID at 7-8. We note that the appellant completed the sections of the initial appeal form pertaining to the Veterans Employment Opportunities Act of 1998 (VEOA). IAF, Tab 1 at 8-9. His actual allegations, however, do not suggest that the agency failed to observe veterans' preference laws, but instead suggest discrimination based on uniformed service. He stated that (1) he is a disabled veteran with a 40 percent service-connected disability; (2) the agency failed to give the DVA adequate time to provide documentation addressing his disability; and (3) the agency discriminated against him due to his service-connected disability. *Id.*

¶10 Detecting an inchoate USERRA claim, the agency addressed the Board's jurisdictional standards in its response to the appeal and attempted to set forth the appellant's burden of proof. IAF, Tab 5, Subtab 1 at 1, 6-7. Despite the agency's recognition of the claim, the AJ issued an order[5] in which she narrowed the issues for the case to the following:

> A. Whether the appellant failed to maintain regular attendance and was absent without permission.
>
> B. If so, whether removal is a reasonable penalty which promotes the efficiency of the service.
>
> C. Whether the agency's action is the result of disability discrimination.

IAF, Tab 9 at 2. The order provided in boldface type that all other issues were precluded from consideration. *Id.* Generally, an appellant is deemed to have abandoned a discrimination claim if it is not included in the list of issues in a prehearing conference summary, or status conference summary, and the party was afforded an opportunity to object to the conference summary. *Yovan v. Department of the Treasury*, 86 M.S.P.R. 264, ¶ 7 (2000). The order here, however, did not offer the parties any opportunity to challenge the AJ's rulings and it was not a prehearing conference or status conference summary. We cannot conclude that the appellant, who is *pro se*, simply abandoned his USERRA claim. *Cf. Yovan*, 86 M.S.P.R. 264, ¶¶ 7-8 (finding that where the AJ did not prepare a prehearing conference summary, the appellant could not have abandoned his discrimination claim and the Board would remand the appeal for further

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[5] In the order, the AJ stated that the appellant failed to comply with the Board's Order and Notice of Hearing and that he was unavailable for the prehearing conference. IAF, Tab 9 at 1-2. The order provided that if he failed to respond to it, the appeal would be dismissed for failure to prosecute, and if he failed to show good cause for his failure to comply with the Order and Notice of Hearing, the hearing would be canceled. *Id.* at 2. In response, the appellant promptly notified the AJ that he did not receive her e-mail notification regarding the conference and that he was having telephone problems. IAF, Tab 10.

adjudication). The appellant's specific allegations about the agency's USERRA violations suggest he may have intended them as an affirmative defense. Accordingly, we REMAND this appeal for consideration of the USERRA claim. On remand, the AJ shall notify the appellant of the USERRA burdens and methods of proof.[6]

¶11 The appellant also may have attempted to raise a VEOA claim in this appeal. As stated above, he completed the section pertaining to VEOA on his initial appeal form. IAF, Tab 1 at 8-9. The agency addressed VEOA jurisdiction in its response to the appeal, though its argument is insufficient as *Burgess* notice. IAF, Tab 5, Subtab 1 at 7-8; *see Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985). As with the USERRA claim, the AJ failed to mention any issue related to VEOA in the list of issues to be decided set forth in the Order. IAF, Tab 9 at 2. Because the appellant had no opportunity to object to the AJ's articulation of the issues, we find that the appellant likewise did not abandon this claim, *cf. Yovan*, 86 M.S.P.R. 264, ¶¶ 7-8, and we REMAND the appeal for adjudication of any VEOA claim that the appellant might have raised. On remand, the AJ shall provide the appellant with a complete statement

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[6] We note here that the Board's standard regarding its USERRA jurisdiction does not require that an appellant invoke the USERRA statute itself. *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1485 (Fed. Cir. 1998). USERRA claims are broadly and liberally construed, *Tindall v. Department of the Army*, 84 M.S.P.R. 230, ¶¶ 6-7 (1999), and there is no statutory time limit for filing an appeal under USERRA, *Tierney v. Department of Justice*, 89 M.S.P.R. 354, ¶ 6 (2001). Even if an appellant raises a USERRA claim for the first time on PFR, we must adjudicate it.

Additionally, the Board has held that, in a USERRA petition for remedial action or in a case when a USERRA violation is raised as an affirmative defense, an AJ must inform an appellant of the USERRA burdens and methods of proof, and must provide an appellant with an opportunity to submit evidence and argument accordingly. Where an AJ has failed to apprise an appellant of the burdens and the methods of proof, the Board - noting that failure to inform the parties of their burdens under USERRA can prejudice their substantive rights – has remanded the appeal so the AJ could afford such notice and an opportunity to submit evidence and argument under the proper standard. *E.g.*, *Williams v. Department of the Air Force*, 99 M.S.P.R. 269, ¶ 7 (2005).

of the jurisdictional elements for a VEOA claim.[7] *See Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶ 9 (2009).

ORDER

¶12 Accordingly, we AFFIRM the ID in part and REMAND this appeal to the Dallas Regional Office for proceedings consistent with this Opinion and Order regarding the appellant's USERRA and VEOA claims. The AJ shall then issue a new ID that addresses these claims as well as the merits of the removal action.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

[7] If an appellant raises a VEOA claim, he must receive adequate notice regarding his rights and burdens under VEOA before the Board can dismiss the appeal for lack of jurisdiction. *Easter v. Department of the Army*, 99 M.S.P.R. 288, ¶ 6 (2005) (citing *Burgess*, 758 F.2d at 643-44).